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Nos. 16-285 & 16-300

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IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

ERNST & YOUNG, LLP, ET AL.,

Petitioners,

v.

STEPHEN MORRIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh and Ninth Circuits

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE COALITION FOR A DEMOCRATIC WORKPLACE AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

EDWARD F. BERBARIE
Counsel of Record
ROBERT F. FRIEDMAN
SEAN M. MCCRORY
LITTLER MENDELSON, P.C.
2001 Ross Avenue,
Suite 1500, Lock Box 116
Dallas, Texas 75201
(214) 880-8100
eberbarie@littler.com

[Additional Counsel Listed Inside Cover]

LINDA E. KELLY
PATRICK N. FORREST
LELAND P. FROST
733 10th Street, NW,
Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

MALLORY DUNCAN
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Ste. 1200
Washington, DC 20005

Counsel for the National Retail Federation

HENRY D. LEDERMAN
LITTLER MENDELSON, P.C.
1255 Treat Boulevard,
Suite 600
Walnut Creek, CA 94597

WILLIAM J. EMANUEL
LITTLER MENDELSON, P.C.
2049 Century Park East
5th Floor
Los Angeles, CA 90067

MICHAEL J. LOTITO
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104

NOAH G. LIPSCHULTZ
LITTLER MENDELSON, P.C.
80 South 8th Street
1300 IDS Center
Minneapolis, MN 55402

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE COALITION FOR A DEMOCRATIC WORKPLACE AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development in the nation. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The Coalition for a Democratic Workplace ("CDW") comprises over 600 organizations representing millions of employers nationwide in nearly every industry. CDW provides a collective voice to its membership on issues related to labor law reform. The

[1] Counsel of record for all parties received timely notice of the intent of amici curiae to file this brief. S. Ct. Rule 37.2(a). The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, amici curiae state that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amici curiae, their members, or their counsel, have made a monetary contribution to this brief's preparation or submission. *See* S. Ct. Rule 37.6

National Retail Federation ("NRF") is the world's largest retail trade association, representing retailers of all types and sizes from across the United States, ranging from the largest department stores to the smallest sole proprietors, including specialty, apparel, discount, online, independent, grocery retailers, and chain and local restaurants and service establishments, among others.

NAM, CDW, and NRF advocate on behalf of their members on a range of matters, including labor and employment issues. They also file briefs as amici curiae in cases of importance, such as these. All three organizations are made up of a vast number of employers with operations across the United States that utilize pre-dispute arbitration agreements with class action waivers[2] in the employment context.

In 2012, the National Labor Relations Board ("NLRB") abandoned the position taken by its former General Counsel as recently as 2010 to find that arbitration agreements with class waivers violate employees' rights to engage in protected, concerted activity under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) ("*D.R. Horton*"); *see also* 29 U.S.C. § 157. Until recently, the NLRB's position had been consistently rejected in courts across the country. Now, deferring to the NLRB and breaking with their

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[2] Amici use the term "class action waiver" or "class waiver" throughout this brief as a short hand way of describing a provision in an arbitration agreement that prohibits class actions under Rule 23 of the Federal Rules of Civil Procedure, collective actions under 29 U.S.C. § 216(b), and any other type of aggregate litigation allowed under federal or state procedure. The purpose of class waivers is to allow parties to engage only in bilateral arbitration.

sister circuits, the U.S. Courts of Appeals for the Seventh and Ninth Circuits have found arbitration agreements with class waivers violate the NLRA. *Lewis v. Epic Systems*, 823 F. 3d 1147 (7th Cir. 2016); *Morris et al. v. Ernst & Young, LLP*, No. 13-16599 (9th Cir. August 22, 2016). The Seventh and Ninth Circuits' decisions disregard this Court's longstanding FAA jurisprudence and also conflict with the precedent of the Fifth, Second and Eighth Circuits. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013); *Cellular Sales of Mo., LLC v. NLRB*, 824 F. 3d 772 (8th Cir. 2016).

Amici curiae have an interest in ensuring that arbitration agreements entered into between employers and employees are enforced according to their terms, as required by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). Amici curiae respectfully submit this brief to emphasize the importance of the issue to employers throughout the country, especially because amici curiae have numerous members with business operations in multiple circuits, and whose arbitration agreements are now enforceable in some jurisdictions but not others. The conflict in the circuits is well-developed and is in need of immediate resolution. The issue is one of serious importance to employers and employees who rely on the benefits of bilateral arbitration in resolving workplace disputes.

SUMMARY OF ARGUMENT

Bilateral arbitration benefits both employees and employers because it offers speed, efficiency and informality. This Court has consistently recognized the advantages of bilateral arbitration—especially in the employment context. Bilateral arbitration agreements commonly contain class action waivers to ensure

greater consistency with respect to the methods of resolution used in disputes.

The prevalence of class waiver provisions makes the circuit split all the more difficult to handle for employers and employees alike, as the enforceability of agreements now depends on venue. Further, the Seventh and Ninth Circuits' injection of the NLRA into an issue governed by the FAA adds to the confusion for two reasons: (1) the NLRA has a broad judicial review provision which can cause inconsistent rulings in parallel proceedings, and (2) the NLRA excludes "supervisors" from its protection, forcing employers to determine which employees are "supervisors" and use different arbitration agreements for those employees. Determining which employees are "supervisors" under the NLRA is a Sisyphean task because of the NLRB's unpredictable positions, opaque tests and results-oriented case law.

The NLRB's inconsistent approach on the class waiver issue compounds this uncertainty and further undermines the NLRB's most recent position and the Seventh and Ninth Circuits' adoption of it. As recently as 2010, the NLRB's former General Counsel advised the NLRB's Regional Directors that "an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver."[3] Less than two years later, the NLRB changed course in *DR Horton* and disregarded the decades of FAA jurisprudence to which it had previously deferred. The Seventh and Ninth Circuits should not have followed the NLRB to upend years of

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[3] Memorandum GC 10-06 from NLRB General Counsel Ronald Meisburg, p. 2 (June 16, 2010).

this Court's FAA precedent, requiring arbitration agreements to be enforced by their terms, based on the NLRB's sudden change in policy. Employers and employees should be able to enforce their contractual commitments to bilateral arbitration. For that reason, amici curiae respectfully request this Court to issue writs of certiorari and reverse the Seventh and Ninth Circuits' decisions.

ARGUMENT

I. CLASS WAIVERS ARE COMMON AND VALUABLE IN THE EMPLOYMENT CONTEXT AND THEIR BENEFITS MUST BE PRESERVED.

FAA-governed arbitration agreements with class waivers are widespread in the American workplace and offer a valuable alternative to class litigation. In 2015 alone, there were 8,954 Fair Labor Standard Act, 29 U.S.C. § 201 *et seq.* ("FLSA") cases filed, many of which were filed as collective actions.[4] A survey of approximately 350 companies[5] shows class actions in the employment context cost those employers approximately $462.8 million in 2014.[6] In addition to the enormous costs involved in defending against class

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[4] *See* Aaron Vehling, *FLSA Class Actions to Hit Record High in 2016*, LAW 360, (Jan. 12, 2016) http://www.law360.com/articles/745603/flsa-class-actions-to-hit-record-high-in-2016.

[5] Survey participants had average annual revenues of 18.2 billion and median annual revenues of $4.6 billion and operate in more than 25 industries, including banking and financial services, consumer goods, energy, high tech, insurance, manufacturing, professional services, and retail trade. *See The 2015 Carlton Fields Jorden Burt Class Action Survey*, available at http://ClassActionSurvey.com, pp. 1 and 37.

[6] *See The 2015 Carlton Fields Jorden Burt Class Action Survey*, p. 7.

claims, there is also "the risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). As this Court has recognized, it is no surprise that employers, even when faced with just "a small chance of a devastating loss...will be pressured into settling questionable claims." *Id.*; *see also Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, slip op., at p. 46 (2014) (Johnson, dissenting) ("...[C]laims aggregation poses an increased risk of liability even for meritless claims, due to the simple mathematics of aggregating hundreds or thousands of claims (that would not otherwise exist) into one unitary claim. That aggregated claim will pose a greater risk than any individual claim, regardless of whether it is merited or not.")

Class actions also often fail class members and adversely affect commerce and even the judicial system. When enacting the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, & 1711–1715 ("CAFA"), Congress noted that "abuses of the class action device" have "harmed class members with legitimate claims and defendants that have acted responsibly," "adversely affected interstate commerce," and "undermined public respect for our judicial system." CAFA, Pub. L. No. 109-2, § 2(a)(2), 119 Stat. 4, 4 (2005). Congress also found that, "[c]lass members often receive little or no benefit from class actions, and are sometime harmed," including where "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." *Id.* at § 2(a)(3).

In response to these well-recognized concerns, FAA-governed arbitration agreements with class waivers

have grown popular in the workplace[7] and provide benefits to employees and employers alike. While class proceedings "make[ ] the process slower, more costly, and more likely to generate procedural morass than final judgment," bilateral arbitration brings "the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348. This Court has also specifically recognized the advantages of bilateral arbitration in the employment context. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). As the NLRB's former General Counsel advised, "[i]t should not be overlooked that employers and employees alike may derive significant advantages from arbitrating clams rather than adjudicating them in a court of law."[8]

In sum, FAA-governed arbitration agreements containing class and collective actions waivers are now common in the American workplace and provide valuable benefits to both employers and employees across the country. The importance of preserving bilateral arbitration as an efficient means of resolving workplace disputes cannot be overstated, and this Court should address and preserve the viability of class waivers.

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[7] In 2014, 42.7% of the 350 companies surveyed use arbitration provisions which specifically preclude class actions. *2015 Carlton Fields Jorden Burt Class Action Survey*, p. 26; *see also Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) ("Indeed, compulsory arbitration agreements are now common in the workplace...").

[8] Memorandum GC 10-06 from NLRB General Counsel Ronald Meisburg, p. 2 (June 16, 2010).

II. THE CURRENT CIRCUIT SPLIT REGARDING THE ENFORCEABILITY OF CLASS WAIVERS IS UNIQUELY CHALLENGING FOR EMPLOYERS.

While a circuit split always presents difficulties for employers with national operations, this split is uniquely challenging. Employers are in a quandary due to the uncertainty of the current state of the law and conflicting precedent.

A. It is unclear whether *any* class waiver will be enforceable until a venue is selected for suit.

It is impossible to know now whether an FAA-governed arbitration agreement with a class waiver, between an employee covered by the NLRA and an employer, will be enforceable until a party selects a venue for a suit. In California, for example, a class waiver would likely be enforced in a California state court, *see Iskanian v. CLS Transp. Los Angeles*, LLC, 59 Cal. 4th 348, 327 P.3d 129 (2014), *cert. denied*, 135 S. Ct. 1155 (2015), but not in a California federal court. *See Morris et al. v. Ernst & Young, LLP*, No. 13-16599 (9th Cir. August 22, 2016).

It is also unclear whether an employee's agreement to waive class claims will be respected, even for employees who live and work in circuits that have upheld class waivers. For example, an employee in Texas could enter into an agreement with her employer to waive class claims. However, if a similarly situated employee were to file a class action suit against the employer in a court in the Seventh Circuit, the employee in Texas could potentially opt-in to an FLSA collective action, or worse yet, become an unwilling participant in a Rule 23 class action, if

she fails to opt-out in a timely manner. The Texas employee's otherwise valid arbitration agreement could be vitiated, merely because a coworker initiated a class action in the Seventh Circuit.

Additionally, due to the NLRA's broad judicial review provision, parties could receive contradictory decisions on the enforceability of the *same* agreement. Consider this hypothetical: if a group of employees covered by the NLRA were to file a class action in a United States District Court in the Seventh Circuit, and an employer were to move to compel individual arbitration based on a class waiver, the U.S. District Court would find the class waiver violates the NLRA and not enforce it. If along with the class action, the employees were to file a charge with the NLRB, the NLRB would likewise find the class waiver violated the NLRA. If the employer conducts business in the Fifth Circuit, however, the employer could challenge the NLRB's determination in that Circuit.[9] The Fifth Circuit would likely find the *exact same agreement between the same parties* lawful, while the U.S. District Court in the Seventh Circuit would find it unlawful under the NLRA.

The circuit split, therefore, calls into question the enforceability of all class waivers entered into with employees covered by the NLRA and makes enforceability a function of venue. This Court must resolve the issue to provide predictability as to the enforceability of these important contracts.

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[9] The NLRA provides an "aggrieved party" the ability to seek review from the circuit where the unfair labor practice occurred, where an employer conducts business or the D.C. Circuit. 29 U.S.C. § 160(f).

B. The NLRB's definition of "supervisors" is unpredictable, rendering it difficult for employers to determine which employees may enter into an agreement with a class waiver.

Complicating matters for employers is the fact that the NLRA's protections do not extend to all employees. The rights granted by the NLRA apply only to "employees" not "supervisors." 29 U.S.C. § 152 (3) & (11). Thus, "supervisors" do not have the right to engage in concerted activity, and there is therefore no basis to find an arbitration agreement with a class waiver between a "supervisor" and employer to be unlawful under the NLRA. While the distinction between supervisors and non-supervisors may be obvious in the workplace, the NLRA, as interpreted by the NLRB, is not. Employees are supervisors under the NLRA if:

> (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in [29 U.S.C. § 152(11)];[10] (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer."

Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006).

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[10] The supervisory functions set forth in 29 U.S.C. § 152(11) include the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action.

The Board's gloss on the NLRA's definition can make it exceedingly difficult to determine, much less predict, who is a supervisor under the NLRA. Amorphous phrases such as "the use of independent judgment," "responsibly to direct," "effectively to recommend," and "in the interest of the employer" are notoriously difficult for courts to define, let alone employers who are trying to determine–often at the outset of the employment relationship–who is, and is not, a "supervisor," and who may sign an agreement with a class waiver.[11] This is especially true as a result of the NLRB's often criticized and, at best, inconsistent interpretation of the supervisory test. *See, e.g., NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 716–17 (2001) ("The Board's refusal to apply its limiting interpretation of 'independent judgment'...is particularly troubling because just seven years ago we rejected the Board's interpretation of part three of the supervisory test that similarly was applied."); *NLRB v. Prime Energy Ltd. P'ship*, 224 F.3d 206, 209 (3d. Cir. 2000) ("As the NLRB has evaluated and categorized various jobs in the economy, courts have noted the Board's failure to arrive at a reasonably consistent view of the statutory definition of supervisor."); *Spentonbush/Red Star Cos. V. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997) ("The Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in

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[11] In fact, according to the NLRB, there is even a three factor test to determine what "independent judgment" means: (1) the authority to "effect an assignment ... must be independent" and "free from the control of others;" (2) there must be "judgment," meaning formation of an opinion or evaluation by discerning and comparing data; and (3) the "judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Oakwood Healthcare*, 348 NLRB at 692.

this area."); *Beverly Enters, Va., Inc. v. NLRB*, 165 F.3d 290, 296 (4th Cir. 1999) (noting that the Board's unexplained shifts regarding the supervisory status of nurses "has prompted widespread speculation that the Board's decisions on this subject are based not on the three-pronged test of the Act but on a 'policy bias.'"); *Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989) (Posner, J.) ("More important than the verbal niceties in the standard of review is judicial impatience with the Board's well-attested manipulativeness in the interpretation of the statutory test for 'supervisor.'").

Employers in the Seventh and Ninth Circuits cannot be expected to divine, especially at the outset of the employment relationship, whether the NLRB will classify certain employees as supervisors. This added layer of complexity makes the NLRB's, and now the Seventh and Ninth Circuits' position, in relation to class waivers all the more untenable.

III. THE NLRB SHOULD NOT BE ABLE TO DICTATE WHETHER CLASS WAIVERS IN FAA-GOVERNED ARBITRATION AGREEMENTS ARE ENFORCEABLE.

A mere 18 months before the NLRB's decision in *DR Horton*, the NLRB's former General Counsel issued a memorandum that directly contradicts the NLRB's current position.[12] In the memorandum, the NLRB's General Counsel states "an employer does not violate Section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in

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[12] Memorandum GC 10-06 from NLRB General Counsel Ronald Meisburg, p. 2 (June 16, 2010).

arbitration."[13] A "*Gilmer* agreement" refers to *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), where this Court decided that an "employer could require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims to a private arbitral forum for resolution."[14] The memorandum continues that *Gilmer* and its progeny "should not be regarded differently under the NLRA just because an individual employee, in waiving his or her right to a judicial forum, is also in effect waiving his or her individual right to pursue a class action."[15] The memorandum ends with clear instructions for processing charges related to agreements that deny employees the right to file a class action lawsuit: "Employers, nonetheless, may require individual employees to sign a *Gilmer* waiver of their right to file a class or collective action claim without per se violating the Act."[16]

The NLRB's sudden change in course rejects this Court's long-standing FAA jurisprudence. *See, e.g., American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (courts must "rigorously enforce" arbitration agreements according to their terms, including terms that "specify with whom [the parties] choose to arbitrate their disputes"). While the NLRB bends its position and agenda to the political winds,[17] courts should not allow these policy shifts to

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[13] *Id.*

[14] *Id.* at p. 5.

[15] *Id.*

[16] *Id.* at p. 7.

[17] *See* Michael C. Harper, JUDICIAL CONTROL OF THE NATIONAL LABOR RELATIONS BOARD'S LAWMAKING IN THE AGE OF *CHEVRON* AND *BRAND X*, 89 B.U. L. Rev. 189-90, 222 (2009) ("Like that of prior Boards, the lawmaking of the President Bush-appointed

upend this Court's precedent upholding the enforceability of bilateral arbitration agreements according to their terms.

Accordingly, review of the Seventh and Ninth Circuits' opinions adopting the NLRB's analysis is necessary, and these cases are the proper vehicles to address the issue presented for review by Petitioners. These cases involve the actual parties to FAA-governed arbitration agreements, advocating for their own legal rights. After all, it is these parties—the real parties in interest—who will have to live with the consequences of any decision by this Court.

CONCLUSION

The Seventh and Ninth Circuits mistakenly followed the lead of the NLRB to disregard this Court's FAA precedent on bilateral arbitration agreements. The resulting circuit split is unusually burdensome and unpredictable. Under the current state of the law, the enforceability of an FAA-governed arbitration agreement with a class waiver depends largely on the venue where the parties seek to enforce the agreement. And the NLRA's judicial review provisions, as well as the challenge of defining who is a "supervisor," increase the confusion caused by the split. To remedy

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National Labor Relations Board has generated criticism and controversy. Although some of the criticism has been directed at the substance of the law and policy made by the Board, much of it has highlighted the extent to which the Bush-appointed Board has overturned prior decisions, thereby unsettling reliance on Board doctrine and respect for the Board as an expert administrative agency at least somewhat insulated from political shifts. This critique of excessive policy oscillation echoes criticism of earlier Boards...").

these issues, amici curiae respectfully request the petitions for writs of certiorari be granted.

Respectfully submitted,

LINDA E. KELLY
PATRICK N. FORREST
LELAND P. FROST
733 10th Street, NW,
Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

MALLORY DUNCAN
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Ste. 1200
Washington, DC 20005

Counsel for the National Retail Federation

EDWARD F. BERBARIE
Counsel of Record
ROBERT F. FRIEDMAN
SEAN M. MCCRORY
LITTLER MENDELSON, P.C.
2001 Ross Avenue,
Suite 1500, Lock Box 116
Dallas, Texas 75201
(214) 880-8100
eberbarie@littler.com

HENRY D. LEDERMAN
LITTLER MENDELSON, P.C.
1255 Treat Boulevard,
Suite 600
Walnut Creek, CA 94597

WILLIAM J. EMANUEL
LITTLER MENDELSON, P.C.
2049 Century Park East
5th Floor
Los Angeles, CA 90067

MICHAEL J. LOTITO
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104

NOAH G. LIPSCHULTZ
LITTLER MENDELSON, P.C.
80 South 8th Street
1300 IDS Center
Minneapolis, MN 55402